UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 12, 2013

CBCA 2923

DCE PROPERTIES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Peter S. Wolff of Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Pittsburgh, PA; and August M. Damian of Damian & Damian, P.D., Pittsburgh, PA, counsel for Appellant.

Robert Notigan, Jr., Office of Regional Counsel, General Services Administration, Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **BORWICK**.

DANIELS, Board Judge.

In this decision we hold, notwithstanding arguments by the appellant, that the Tax Adjustment clause of a contract for the lease of real property is to be applied as written. The case has been submitted for a decision on the basis of the written record. Board Rule 19(a) (48 CFR 6101.19(a) (2012)). The decision is being issued by a panel of two judges, rather than the usual three, as a consequence of the appellant's election of the accelerated procedure. *See* 41 U.S.C. § 7106(a) (Supp. IV 2011); Board Rule 53.

Findings of Fact

The facts relevant to the dispute are uncontested.

DCE Properties (DCE) agreed, in a contract dated April 15, 2002, to lease to the General Services Administration (GSA) an office area and parking spaces at a building in Monroeville, Pennsylvania. Per supplemental lease agreement one, the lease term was to run from April 1, 2003, to March 31, 2013.

The lease contains a Tax Adjustment clause which provides that the Government will:

> 1) make a single annual lump sum payment to the Lessor for its share of any increase in real estate taxes during the lease term over the amount established as the base year taxes or 2) receive a rental credit or lump sum payment for its share of any decreases in real estate taxes during the lease term below the amount established as the base year taxes.

The clause conditions the operation of this provision, however. The qualification is printed in capital letters and boldface type in the following paragraph:

> In the event of an increase in taxes over the base year, the lessor shall submit a proper invoice of the tax adjustment including the calculation thereof together with evidence of payment to the Contracting Officer. **THE GOVERNMENT SHALL BE RESPONSIBLE FOR PAYMENT OF ANY TAX INCREASE OVER THE BASE YEAR TAXES ONLY IF THE PROPER INVOICE AND EVIDENCE OF PAYMENT IS SUBMITTED BY THE LESSOR WITHIN 60 CALENDAR DAYS AFTER THE DATE THE TAX PAYMENT IS DUE FROM THE LESSOR TO THE TAXING AUTHORITY.**

DCE submitted its invoices for tax adjustment payments for 2010 and 2011 more than sixty calendar days after the dates on which the tax payments for those years were due from DCE to the taxing authorities.

The parties agree that the amounts which GSA would owe under this clause, if the Board rules in favor of DCE, are $13,038.56 for each of the two years – a total of $26,077.12.

Discussion

The question posed by this appeal is, Should the highlighted condition in the Tax Adjustment clause be given its literal effect? One of our predecessor boards of contract appeals had occasion to consider this question with regard to similar provisions in at least four previous cases. That board established general principles for resolution in *Riggs National Bank of Washington, D.C. v. General Services Administration*, GSBCA 14061, 97-1 BCA ¶ 28,920:

> Generally, limitations imposed by contract provisions should be applied liberally; if the contractor fails to meet such a limitation, the provision should be enforced only where the Government demonstrates that it has been prejudiced by the failure. Where a contract clearly states that the contractor will lose rights if it does not make a submission within a prescribed period of time, however, the limitation should be strictly enforced. This guidance effectively meshes the teaching of *Hoel-Steffen* [*Construction Co. v. United States*, 456 F.2d 760, 767-68 (Ct. Cl. 1972)] and decisions following it with the general rule that "agreed-upon contract terms must be enforced" and "[c]ontracting parties must be held to their agreements." *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1403-04 (Fed. Cir. 1993) (citing numerous decisions).

Id. at 144,179.

In *Riggs*, as well as *Universal Development Corp. v. General Services Administration*, GSBCA 12138(11520)-REIN, et al., 93-3 BCA ¶ 26,100, and *Roger Parris v. General Services Administration*, GSBCA 15512, 01-2 BCA ¶ 31,629, the board found for the Government. We concluded that because the contract clearly stated that the contractor would lose its rights to a tax adjustment to the rent payment if it did not provide certain information within a specified period of time, and the contractor did not provide that information within that period, the contractor was not entitled to the tax adjustment claimed. As DCE notes, the board found for the contractor in one case involving a similar tax adjustment clause, *4J2R1C L.P. v. General Services Administration*, GSBCA 15584, 02-1 BCA ¶ 31,742. That decision was based, however, on principles different from those enunciated in *Riggs*. The Government was not permitted to enforce its rights under the clause because the parties had engaged in a course of dealing over several years in which the Government had knowingly made tax adjustment payments despite having been provided late notice, and the lessor had reasonably relied on this established course of dealing in agreeing to an extension of the lease term.

The case we consider now is very much like the first three of these cases. The contract clearly stated, in boldface, capital letters, that the Government would be responsible for tax increases only if DCE provided it with "proper invoice and evidence of payment" of real estate taxes "within 60 calendar days after the date the tax payment is due." DCE did not provide the prescribed information within the specified period of time. There was no course of dealing under which the Government had effectively abandoned its rights, as in *4J2R1C*. Thus, we hold the lessor to its bargain, which precludes it from recovery.

DCE maintains that "[t]he doctrine of substantial performance applies to the facts of this case and requires that an award be entered in favor of DCE." According to the lessor, the requirement that an invoice and evidence of payment of taxes be provided within a fixed time period is a technicality. The lessor urges that allowing GSA to receive a "windfall" due to DCE's having failed to meet the requirement would amount to a forfeiture. Because DCE has substantially performed all of its obligations under the lease, it believes that "[t]he doctrine of substantial performance precludes this harsh result."

"Substantial performance . . . refers to the equitable doctrine that guards against forfeiture in situations where a party's contract performance departs in minor respects from that which had been promised." *Franklin E. Penny Co. v. United States*, 524 F.2d 668, 676 (Ct. Cl. 1975). "[T]he purpose of the substantial performance doctrine is to avoid the harshness of a forfeiture." *Id.* at 677. This doctrine has been applied in cases involving contracts for construction (*e.g.*, *Penny*; *H.L.C. & Associates Construction Co. v. United States*, 367 F.2d 586 (Ct. Cl. 1966); *R. M. Crum Construction Co.*, VABCA 2143, et al., 85-2 BCA ¶ 18,132) and for the supply of goods (*e.g.*, *Radiation Technology, Inc. v. United States*, 366 F.2d 1003 (Ct. Cl. 1966); *American Business Systems*, GSBCA 5140, et al., 80-2 BCA ¶ 14,461). In each of those situations, forfeiture – such as through a termination for default – has been found improper if the contractor has provided the Government with what was bargained for, aside from insubstantial defects.

DCE has not found any cases in which the doctrine has been applied to a contract for the lease of real property, however, and neither have we. Even if one could be found, we do not see how the doctrine could apply to this case, for here, DCE has provided to GSA exactly what was bargained for – office area and parking spaces at a particular building – and the lessor has not suggested that GSA has paid anything less than the agreed-upon rent in exchange. DCE did have the opportunity to receive even more money if it complied with a particular requirement in the contract, but it did not so comply. No forfeiture was involved.

Decision

The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

I concur:

ANTHONY S. BORWICK
Board Judge